Supreme Court, U. S.
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No. 79-1945

In the Supreme Court of the United States

OCTOBER TERM, 1979

ELIA RONCKETTI AND ELLEN RONCKETTI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In this federal income tax case petitioners seek review of the dismissal of their appeals for lack of jurisdiction.

The pertinent facts are as follows: The Commissioner of Internal Revenue determined a deficiency in petitioners' 1975 income tax liability of $24,894.00 plus a 5% negligence penalty of $1,244.70, pursuant to Section 6653(a) of the Internal Revenue Code of 1954 (26 U.S.C.). Thereafter, petitioners filed a petition with the Tax Court seeking a review of the Commissioner's determination. During the course of those proceedings, petitioners moved to strike the Commissioner's answer and to enter judgment in their favor, and for an order directing the Internal Revenue Service to take its determination of deficiency to a proper United States district court. From the Tax Court's denials of these motions, petitioners filed

two notices of appeal to the court of appeals, which consolidated the appeals.

The Commissioner moved to dismiss petitioners' appeals for lack of jurisdiction, on the ground that neither appeal was taken from a final decision of the Tax Court. By order of February 19, 1980, the court of appeals dismissed the appeals. On March 10, 1980, the court denied petitioners' motions for reconsideration (Pet. App. A). In that same order, the court of appeals denied petitioners' motion to dismiss the Commissioner's determination of deficiency. On April 15, 1980, the court of appeals denied petitioners' motion to alter judgment.

1. We call the Court's attention to certain facts that may indicate that the petition was filed out of time. The court of appeals denied petitioners' motion for reconsideration on March 10, 1980. The petition was not filed until June 11, 1980, or 93 days later. Because petitioners sought no extension of the 90-day time limit for petitioning in civil cases (28 U.S.C. 2101(c)), the petition is out of time. However, since the court of appeals on April 15, 1980, denied reconsideration of at least a portion of its original order, we therefore address the merits of the petition.

2. The court of appeals correctly dismissed petitioners' appeals. Section 7482(a) of the Internal Revenue Code of 1954 grants the courts of appeals jurisdiction "to review the decisions of the Tax Court," and Section 7459(c) defines the term "decision" as "an order specifying the amount of the deficiency." It simply denied petitioners' motions. Here, it is plain that the Tax Court did not render a decision. Hence, the court of appeals lacked jurisdiction at this juncture of the case. See, *e.g.*, *Ryan* v. *Commissioner*, 517 F.2d 13 (7th Cir. 1975); *Porter* v. *Commissioner*, 453 F.2d 1231 (5th Cir. 1972); *Licavoli* v.

Commissioner, 318 F.2d 281 (6th Cir. 1963); *Kiker* v. *Commissioner*, 218 F.2d 389 (4th Cir. 1955).

3. Although the appeals were dismissed on jurisdictional grounds, petitioners contend that disclosure of their books and records in order to substantiate the items on their 1975 income tax return might incriminate them in some future criminal prosecution, or might somehow lead to a reopening of an examination by the Internal Revenue Service's Criminal Investigation Division of their 1973 and 1974 tax years. Petitioners have not, however, established the requisite basis for claiming the privilege against self-incrimination. Blanket assertions of the privilege against self-incrimination are legally insufficient where the possibility of future criminal prosecution is speculative or remote. *Ryan* v. *Commissioner*, 67 T.C. 212 (1976); *Roberts* v. *Commissioner*, 62 T.C. 834, 838 (1974); *Heligman* v. *United States*, 407 F.2d 448, 450 (8th Cir.), cert. denied, 395 U.S. 977 (1969). Petitioners are simply attempting to use the Fifth Amendment privilege as a sword to avoid the payment of income taxes. At all events, even if petitioners had a reasonable basis for invoking the privilege, there are remedies, such as deferral of the proceedings, that do not require the discharge of petitioners' tax liabilities.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

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